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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

PIONEER AMERICAN INSURANCE COMPANY, THE DEVELOPMENT COMPANY, INC., AND ALFRED J. ANDERSON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arkansas.

OPINION BELOW

The decree of the Chancery Court of Sebastian County, Arkansas (R. 112–128), is not reported. The opinion of the Supreme Court of Arkansas (App. A, *infra*, pp. 10–20) is reported at 235 Ark. 267, 357 S.W. 2d 653.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on June 4, 1962. (App. A, *infra*, pp. 20–21.) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether federal tax liens are entitled to priority over the claim of a mortgagee for an attorney's fee incurred in prosecuting a foreclosure suit where notice of the federal tax liens was recorded prior to the entry of the judicial decree which allowed and determined the amount of the fee.

STATUTES INVOLVED

The provisions of Sections 6321, 6322 and 6323 of the Internal Revenue Code of 1954 and Sections 68–101, 68–102 and 68–910 of the Arkansas Statutes are set forth in App. B, *infra*, pp. 22–24.

STATEMENT

In 1958, the taxpayers (Ocie A. Rogers and Florence W. Rogers, his wife) purchased a parcel of real property in Sebastian County, Arkansas, assuming liability on a note, secured by a mortgage, held by the Pioneer American Insurance Company (R. 114–116). The note recited that the maker agreed, "in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee" (R. 15). The mortgage securing the note provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the mortgage would become due and the mortgage could be foreclosed (R. 115).

Taxpayers defaulted on the monthly payment due in October 1960, and all subsequent payments. On

March 24, 1961, Pioneer filed a suit to foreclose its mortgage, praying for a reasonable attorney's fee (R. 13–14). The United States was named a party defendant because of two outstanding liens for federal taxes assessed against the taxpayers, one having been filed on November 29, 1960, and the other on January 30, 1961 (R. 12). In its answer the United States admitted that its liens for taxes were subordinate to the lien of the mortgagee to the extent of principal and interest, but asserted its liens were superior to the lien of the mortgagee for an attorney's fee (R. 40–41, 106, 121). On November 9, 1961, in an amendment to its answer, the United States added three more tax liens filed on April 14, July 17, and October 3, 1961 (R. 110–111, 120).[1]

On November 11, 1961, the Chancery Court of Sebastian County entered a decree of foreclosure (R. 112–128) which provided for an attorney's fee of $1,250 and also determined priority as between Pioneer and the United States as follows (R. 122):

> The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, (for all amounts it secures, including principal of the note and interest thereon; * * * and attorney's fees fixed by the Court) * * *.

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[1] As found by the Chancery Court, the five liens of the United States by date of filing and amount are as follows (R. 120; see R. 40–41, 110–111, 234–235):

November 29, 1960	$ 559.52
January 30, 1961	1,567.14
April 14, 1961	1,288.96
July 17, 1961	1,606.87
October 3, 1961	1,148.69

This meant that the United States received $1,250 less on its claims than it would have.[2]

On appeal by the United States, the Supreme Court of Arkansas (Chief Justice Harris dissenting) affirmed the decree of the Chancery Court (App. A, *infra*, pp. 10–16, 16–20).

[2] The United States had also admitted that its liens were junior to a second mortgage on the property held by The Development Company, Inc., and the court held, in a ruling not challenged on appeal, that a mechanics lien held by Alfred J. Anderson (for $207.79) was also senior to the tax liens. The priorities thus established ahead of the tax liens were:

Pioneer American Insurance Company:	
Principal and interest	$17,570.70
Attorney fee	1,250.00
Development Company	2,071.10
Alfred J. Anderson	207.79
Total	21,099.59

If Pioneer's claim for the attorney's fee paid by it were held to be junior to the tax liens, the total of the claims prior to the tax liens would be reduced to $19,849.59, and the proceeds in excess of that amount would go to the United States. The distribution of the $19,849.59 set aside prior to the payment of the tax liens would then, however, be distributed among the other claimants according to their relative priorities under state law. If the state court applied the rules of priority enunciated in this case, Pioneer would still receive its entire claim of $17,570.70 for principal and interest plus the $1,250 for the attorney's fees; Development Company would recover only $1,028.89 of its claim under the second mortgage for $2,071.10; and Anderson would receive nothing on his mechanic's lien. The rights of the private parties *inter se* is, however, solely a question of state law not involved here; the only question presented by this petition is the inclusion of Pioneer's attorney-fee claim in the total of the claims entitled, under federal law, to priority over the tax lien. See *United States* v. *New Britain*, 347 U.S. 81, 88.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Arkansas has held that an attorney's fee which is determined and allowed to a mortgagee by the decree in a mortgage foreclosure suit is entitled, as a part of the mortgage debt, to priority of payment over federal tax liens which arose and notices of which were recorded against the mortgaged property prior to the decree. The decision is incorrect and is contrary to decisions of this and other courts.

1. The decision below is contrary to the decisions of this Court. Those decisions establish that, for a lien arising under state law to be entitled to priority over the federal tax lien created by Section 6321 of the Internal Revenue Code of 1954 (App. B, *infra*, p. 22), the competing lien must be "choate" at the time the tax lien arises and is recorded. *E.g., United States* v. *New Britain*, 347 U.S. 81, *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47. In turn, as *New Britain* and the numerous subsequent cases reaffirming that decision[3] establish, a lien does not become choate, for that purpose, until the identity of the lienor, the property subject to the lien, and the amount

[3] *United States* v. *Acri*, 348 U.S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215; *United States* v. *Scovil*, 348 U.S. 218; *United States* v. *Colotta*, 350 U.S. 808; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010; *United States* v. *Vorreiter*, 355 U.S. 15; *United States* v. *Ball Construction Co.*, 355 U.S. 587; *United States* v. *Hulley*, 358 U.S. 66; *Crest Finance Co.* v. *United States*, 368 U.S. 347. The decisions also establish that the doctrine of relation back cannot be applied to defeat the priority of federal liens. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50.

of the lien are fixed and certain. Since the amount of the mortgagee's lien for attorneys' fees was not fixed until after the filing of the five federal tax liens involved here, it was not entitled to priority over those liens.

Contrary to the suggestion of the court below (App. A, *infra*, p. 14), the mortgagee's lien for attorney's fees did not become choate upon the occurrence of a default in payment of the note for at that time neither the mortgagor's liability for nor the amount of the fee was certain. As Chief Justice Harris pointed out in his dissenting opinion (App. A, *infra*, p. 19), the terms of the note contemplate and Section 68–910 of the Arkansas Statutes (App. B, *infra*, p. 24) expressly provides that the note holder is entitled only to a reasonable attorney's fee for services actually rendered in enforcing payment. Here, the liability for payment of a fee became certain only after the services of an attorney were rendered sometime subsequent to the default, and the reasonable amount of the fee for the services actually performed was not determined until November 11, 1961, when the Arkansas Chancery Court entered its foreclosure decree and allowed and awarded the fee. This was more than a month after the last of the federal tax liens was filed of record.*

* There is no merit to the suggestion of the Arkansas Supreme Court (App. A, *infra*, pp. 14, 15) that Section 68–910 of the Arkansas Statutes (App. B, *infra*, p. 24), which makes a provision in a promissory note for payment of reasonable attorneys' fees for services actually rendered "enforceable as a contract of indemnity," renders the mortgagee's lien for fees choate at the time of a default. The purpose of the statute is to meet the contention of debtors that such a provision in a promissory note is void and not enforceable. The "contract of indem-

2. The decision is squarely in conflict with *United States* v. *Bond*, 279 F. 2d 837 (C.A. 4), certiorari denied, 364 U.S. 895; *In re New Haven Clock & Watch Co.*, 253 F. 2d 577, 583–584 (C.A. 2); and *Bank of America National Trust and Savings Assoc.* v. *Embry*, 188 C.A. 2d 425, 10 Cal. Rptr. 602 (C.A. 3d Dist.), in which the very question presented here was decided in favor of the priority of the federal tax liens.[5] Thus, in *Bond*, the Fourth Circuit held that the claim of a mortgagee for an attorney fee paid by it in protecting the lien of its mortgage had to be subordinated to priority of the federal tax liens, because (279 F. 2d at 846)—

> The fee was incurred long after the attachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt secured thereby, the future existence or amount of such attorney fee was, at best, speculative and uncertain.

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nity" label does not alter the federal test for choateness which requires that the amount of the lien be fixed.

Neither is there any merit to the majority's view (App. A, *infra*, pp. 15–16) that to allow the United States to receive payment for its tax liens, before payment of the fee due the attorney "would violate the rules against unjust enrichment," for this is not a situation where the attorney has created or increased the fund available for distribution. *Cf. Southern Railway Co.* v. *United States* (C.A. 5), decided July 19, 1962 (62-2 U.S.T.C., ¶ 9631).

[5] To the same effect, see *United States* v. *Ringler*, 166 F. Supp. 544 (N.D. Ohio). The case of *Security Mortgage Co.* v. *Powers*, 278 U.S. 149, cited by the court below (App. A, *infra*, p. 14, fn. 5), does not support the mortgagee's position. That case did not involve a federal tax lien and was thus not decided under the principles for determining priorities of liens which are applicable here.

3. The question presented affects a large number of property transactions throughout the country and is important to the administration of the internal revenue laws and to the collection of the federal revenue. The issue is potentially present in every mortgage foreclosure action in which the United States is named a party defendant. There were 3817 such cases during the fiscal year 1961–1962, and the issue may be expected to arise with the same or perhaps even greater frequency in the future. Despite what we believe to be the clear mandate of the holdings of this Court, *supra*, p. 5, the number of cases in which the United States is called upon to defend the priority of federal tax liens against claims by mortgagees for attorneys' fees continues to increase. A number of such cases in which the trial courts have subordinated the federal lien to later-arising claims for attorneys' fees are presently pending in federal and state appellate courts. *E.g., Western Montana Building & Loan Assn.* v. *Johnson,* (D. Mont.), decided February 14, 1962, pending on appeal by the United States to the Ninth Circuit; *United States* v. *First Federal Savings & Loan Assn. of St. Petersburg,* pending on appeal to District Court of Appeals of Florida for the Second District (No. 3258); and four unreported cases pending in the Illinois appellate courts—*E. A. Juzwik* v. *George W. Diener Mfg. Co.; Universal Mortgage & Investment Co.* v. *Wm. R. Lovell; Apollo Savings & Loan Assn.* v. *Wm. E. Burow; Mount Mayriv Cemetery Assn.* v. *Thomsen.*

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict between the decision of the highest court of Arkansas and the contrary decisions of Courts of Appeals for the Second and Fourth Circuits as well as to protect the integrity of the rules governing the priority of federal tax liens established by this Court.

Respectfully submitted,

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SEPTEMBER 1962.

APPENDIX A

UNITED STATES *v.* PIONEER AMERICAN INS. CO.

5-2732

Opinion delivered June 4, 1962.

ED. F. MCFADDIN, Associate Justice. This appeal challenges a decree which held that an attorney's fee in the mortgage foreclosure suit was superior to the federal tax lien. Events and dates are as follows:

1. On May 24, 1956, The Development Company, Inc., for value received, executed a note for $20,000.00 secured by a mortgage on real estate in Sebastian County, Arkansas. The mortgage was duly filed and recorded on June 7, 1956; and, before maturity, the said indebtedness, together with the mortgage, was transferred to the appellee, Pioneer American Insurance Company of Dallas, Texas (hereinafter called "Pioneer"). The note bound the maker, "* * * in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." The mortgage securing the note provided that if the grantor should fail to pay any interest or installment of principal when due, then, at the option of the holder, all of the indebtedness secured by the said mortgage should become due for all purposes and there could be foreclosure in a court of competent jurisdiction.

2. By deed recorded March 18, 1958, The Development Company, Inc. sold the mortgaged real estate to Ocie A. Rogers and Florence W. Rogers, his wife,

who assumed the mortgage and indebtedness held by Pioneer.

3. The Rogers failed to make the monthly payment in October, 1960, and all subsequent payments; and on March 24, 1961, Pioneer filed foreclosure for the balance due on the debt and interest, and also for a reasonable attorney's fee. The United States of America was made a defendant in the foreclosure suit because of the federal tax liens that had been filed against Ocie A. Rogers and Florence W. Rogers, the said liens having been filed on the dates and in amounts as follows:

November 29, 1960	$1,776.65
January 30, 1961	1,567.14
April 14, 1961	1,288.96
July 17, 1961	1,606.87
October 3, 1961	1,148.69

4. The United States Government, by answer admitted its lien to be subordinate to the mortgage and interest, but claimed its tax lien to be superior to the attorney fee.

On November 11, 1961, the Chancery Court entered a decree of foreclosure which determined priority as between Pioneer and the United States Government, as follows:

"The lien of United States of America is therefore found to be subordinate to the lien of plaintiff, Pioneer American Insurance Company, for all amounts it secures, including principal of the note and interest thereon; * * * and attorney's fees fixed by the court; * * *"

The decree in the Chancery Court also contains these statements which are submitted by appellant on this appeal:

"The United States of America has in open court conceded that its lien is subordinate to the lien of plaintiff, Pioneer American Insurance Company, insofar as principal and interest of said plaintiff's note are concerned, * * *. The United States of America claims, however, that its lien is prior to the lien of plaintiff, Pioneer American Insurance Company, so far as same secures * * * attorney's fee * * *."

So much for dates and background information. The United States Government (hereinafter sometimes called "Appellant") has appealed from so much of the Chancery decree as adjudged the attorney's fee allowed Pioneer in the sum of $1,250.00 to be superior to the United States' tax lien claims[1]; and the appellant relies on U.S Code Annotated, Title 26, § 6321 *et seq.;* and also, *inter alia*[2], the following cases: *U.S.* v. *New Britain,* 347 U.S. 81, 98, L. Ed. 520, 74 S. Ct. 367; *U.S.* v. *Security Trust & Savings Bank,* 340 U.S. 47, 95 L. Ed. 53, 71 S. Ct. 111; *U.S.* v. *Bond* (4th Cir.), 279 F. 2d 837 (*certiorari* denied by U.S. Supreme Court, 364 U.S. 895, 5 L. Ed. 2d 189, 81 S. Ct. 220); *U.S.* v. *Christensen* (9th Cir.), 269 F. 2d 624; and *In Re New Haven Clock & Watch Co.,* (2d Cir.), 253 F. 2d 577.

We recognize the power of the United States

[1] There were other parties in the foreclosure suit and other lien claims involved; but there is no occasion to give details as to these matters because the only issue on this appeal by the United States Government is, as stated in its brief: "Federal tax liens take priority over a mortgagee's lien for an attorney's fee incurred in a foreclosure proceeding, where the federal liens were recorded prior to the time the lien for an attorney's fee became choate."

[2] Both sides have favored us with briefs containing scores of cases, all of which have been studied by us; but we list here those which are most strongly relied on by the appellant, and which have factual situations most similar to the case at bar.

Government to legislate as to the rights to be accorded its tax liens; and we recognize the power of the United States Supreme Court to be the final arbiter in such cases as this. Nevertheless, we do not consider any of the cases relied on by the appellant as completely decisive of the case at bar because of the matters that we now mention:

(A) Section 68–102 Ark. Stats., which is a part of the Negotiable Instruments Law,[3] states: "The sum payable is a sum certain * * * although it is to be paid: * * * (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

(B) The Arkansas Statute on attorneys' fees is Act No. 350 of 1951 (now found in § 68–910 Ark. Stats.), and reads: "A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a *contract of indemnity.*" (Emphasis supplied.)

(C) The United States Government conceded, in open court below, and conceded in its brief filed in this Court, that its tax lien is subordinate to the mortgage and interest in full to date of payment. In accordance with the foreclosure decree, the mortgaged property was sold, and with the consent of the United States Government, Pioneer received the balance of its principal and all interest due to the date of such payment; and a further sum is now held in the Court to await the result of this litigation.

[3] By Act No. 185 of 1961 Arkansas adopted the Uniform Commercial Code, effective January 1, 1962; and § 85–3–106 Ark. Stats. contains the provision of the Uniform Commercial Code similar to § 61–102 Ark. Stats. above quoted.

(D) The default in the payment of the note and mortgage held by Pioneer occurred in *October 1960;* and it was not until *November 1960* that the first tax lien of the United States Government was filed in this case.

We regard Paragraphs (A) to (D) above as, together, being sufficient to distinguish the case at bar from those relied on by the United States Government, as heretofore listed. In the New Britain case,[4] the United States Supreme Court spoke of the requirement that the lien must be "choate". The recording of the mortgage in 1956 put the world on notice that if there should be a default in payment of the note an attorney's fee would be added. There was such a default in October 1960 and the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim.[5]

We have carefully studied the case of *U.S.* v. *Bond,*[6] and also the Virginia statutes and cases[7] regarding

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[4] *U.S. v. New Britain*, 347 U.S. 81, 98 L. Ed. 520, 74 S. Ct. 367.

[5] Attorneys for Pioneer have quoted to us the language of the U.S. Supreme Court in the case of *Security Mtg. Co.* v. *Powers*, 278 U.S. 149, 49 S. Ct. 84, 73 L. Ed. 236, as regards when a lien becomes choate: "The lien was not inchoate at the time of the adjudication. It had already become perfect when the principal note and the loan deed securing it were given . . . When by the happening of the event the contingent liability becomes absolute, the lien becomes enforceable, though this occurs after the adjudication."

[6] *U.S.* v. *Bond* (4th Cir.), 279 F. 2d 837.

[7] Among others, there are: *Colley* v. *Summers*, 119 Va. 439, 89 S.E. 906; and *Cox* v. *Hagan*, 125 Va. 656, 100 S.E. 666.

attorneys' fees in foreclosure of mortgages since the case arose in Virginia; and we fail to find any statute in Virginia that is comparable to our Act. No. 350 of 1951 which says that the contract to pay attorneys' fee is a *contract of indemnity*. Such a statute in this State makes a difference between the Bond case and the case at bar.

In the case at bar the United States has conceded all the time that Pioneer is entitled to its *full debt and interest to date of payment*. Unless Pioneer gets its attorney's fee, it will not receive its full debt and interest, because the attorney's fee will have to be paid by Pioneer out of its debt and interest. So when the United States Government concedes—as it must under the adjudicated cases—that the prior mortgage is entitled to payment in full, it cannot expect the mortgagee to leave its attorney unpaid in the face of a statute which says that the attorney's fee is a contract of indemnity. In 27 Am. Jur. 471, "Indemnity" § 22, in discussing a contract of indemnity against liability, the text quotes the holdings: "In all actions on bonds of indemnity it must appear that the condition of the bond was broken, but, such fact appearing, the obligee is not obliged to wait until he is compelled to discharge the debt; *he may bring an action for a full recovery the moment the first breach happens in failing to perform the condition of the bond.* (Emphasis supplied.)

There is another point that favors Pioneer's claim for attorney fees and which was not discussed in any of the cases cited and relied on by the United States Government in the case at bar; and that is the matter of unjust enrichment. We find no holding directly in point, but we do find the general rules discussed in American Law Institute's Restatement of the Law,

"Restitution" § 103 et. seq. on the topic on "Protection of Property". Pioneer employed attorneys, foreclosed the mortgage, caused a sale of the property and its conversion into money. The United States Government seeks to receive the money before the payment of the fee due the attorneys, whose efforts brought the money into Court. To allow such would violate the rules against unjust enrichment. While attorneys love their work, they do not work entirely for love. Someone must pay the fee: Pioneer employed attorneys after a default which had occurred before the United States ever filed a tax lien; and Pioneer proceeded to reduce the mortgaged property to cash. Under such facts the United States Government should not be allowed to assert a claim superior to the payment of the fee that Pioneer has paid to cause the mortgaged property to be reduced to cash and the proceeds readied for distribution, as they now are.

We are firmly of the opinion that in a court of equity Pioneer was entitled to prevail for its attorney's fee; and we therefore affirm the decree of the Sebastian Chancery Court.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice (Dissenting Opinion). I cannot agree with the Majority opinion, for I am unable to distinguish the facts in the case at bar from those in *U.S.* v. *Bond*, 279 F. 2d 837 (C.A. 4th), and *In re New Haven Clock & Watch Co.*, 253 F. 2d 577 (C.A. 2nd). I do not consider that discussion of those cases is necessary, for brief quotations from the opinions will suffice to explain my views. In *Bond*, the court said:

"For the same reasons, we must subordinate to priority of the federal tax liens the claim for an attorney fee paid by Perpetual in protection of the lien of its mortgage. The fee was incurred long after the at-

tachment of the federal tax lien; and at the time of the execution of the mortgage and the creation of the debt secured thereby, the future existence or amount of such attorney fee, was, at best, speculative and uncertain."

In *New Haven*, that court said:

"The Bank sought an order in the District Court including an award of reasonable attorney's fees because the Clock Company, in the assignment contract, agreed 'to reimburse the Bank for any and all legal and other expenses incurred in and about the checking, handling and collection of the accounts hereby assigned to the Bank and the preparation and enforcement of any agreement relating thereto.' The Government, in its oral argument before this Court and in its brief, opposed this claim on the ground that the United States, acting pursuant to Sections 3670 and 3671 of the Internal Revenue Code of 1939, and Sections 6321 and 6322 of the Internal Revenue Code of 1954, 26 U.S.C. §§ 6321, 6322, had a tax lien on the proceeds of the assigned accounts which was prior to the 'inchoate' lien of the Bank. Since the amount of the Bank's lien for attorney's fees was unknown at the time of the Clock Company's petition for reorganization, this lien was 'inchoate' in the sense used to determine its priority as against a United States tax lien. *United States* v. *City of New Britain*, 347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520. Thus, the Government's lien is superior to the claim for attorney's fees if the United States has complied with the aforementioned provisions of the Internal Revenue Codes and in addition has filed the notice of the lien as required * * *." Here, there is no dispute that the lien was properly filed and recorded.

The Majority apparently depend in large measure upon the fact that our statute provides that a reason-

able attorney's fee is enforceable as a contract of indemnity. In my view, this provision lends no weight to the position taken by the Majority. The sole question here is *when* the insurance company's lien for attorney's fees came into existence, *i.e.*, did the attorney's fee become choate before the Government filed its lien claim? There was a default on the note in October, 1960,[8] and the Majority state:

"* * * the holder of the note, immediately upon such default, became entitled to enforce the contract of indemnity; and all of this was prior to any lien filed by the United States Government. So we are definitely of the opinion that the right for attorney's fee became choate before the United States Government filed its lien claim."

The question, in my view, is not when the company became entitled to enforce the provision for an attorney's fee, but rather, when it actually did enforce it. I emphatically disagree with the statement of the Majority, for I cannot see that the company was due to add the attorney's fee *immediately upon default.* Debtors frequently are a few days late in making payments, but no one would contend that this permits a note holder to add an attorney's fee. The default in payments on this note occurred in October, but I daresay that if Rogers had subsequently made the October payment, and the other payments, no foreclosure suit would have been filed. Certainly, if delinquent payments had been made and accepted by the company, it would not be contended that Pioneer should be permitted to add an attorney's fee. In such event, there would have been no occasion to enforce any contract for indemnity, for there would have been no loss.

[8] The first two federal tax liens were recorded in November, 1960, and January of 1961.

While the default occurred in October, 1960, *the foreclosure suit was not filed until March 24, 1961.* The claim for attorney's fee can only be enforced by court action, and though I am primarily of the opinion that an attorney's fee would not have priority over the Government's tax liens until it had been definitely fixed by the court, (prior to the recording of the liens) still, if that be error, then certainly I can see no possible priority for the attorney's fee until a suit is filed asking for the fee. Both the filing of the complaint, and the order fixing the fee, occurred after the recording of the federal tax liens. The note provides:

"The undersigned also agree(s) that in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee."

Our statute, quoted by the Majority, also provides that the attorney's fee is enforceable "for services actually rendered." Therefore, under the language of both the note and the statute, *a default in payment is not sufficient to enable the note holder to add an attorney's fee;* services actually rendered by an attorney (generally the filing of a suit) are necessary. But, if it be said that an attorney could render service in trying to collect payments on the note before actually instituting any suit, I point out that this record is silent as to *when* this matter was placed in the hands of the attorneys for Pioneer. *There is no evidence that appellee's attorneys rendered any service relative to collection of the note prior to the filing of the foreclosure complaint.*

The Majority state that to allow the Government to recover the amount sought would "violate the rules against unjust enrichment." I personally find no

merit in this contention. The Government has its attorneys, and I am quite sure, would have been only too glad to have brought its own proceeding for sale of the property to satisfy the tax liens if such action would have given it priority over appellee.

While I have commented to some extent relative to statements in the Majority opinion, this dissent is primarily based on the holdings in the *Bond* and *New Haven* cases, a reading of which persuades me that the lien for attorneys' fee did not become choate until a definite, fixed amount was allowed by the court. As previously stated, this, of course, was long after the recording of the federal tax liens.

I accordingly feel that the Government should prevail in its contention, and respectfully dissent.

IN THE SUPREME COURT OF ARKANSAS

October Term 1961. June 4, 1962

UNITED STATES OF AMERICA, APPELLANT, *v.* PIONEER AMERICAN INSURANCE COMPANY, APPELLEE. Appeal from Sebastian Chancery Court, Ft. Smith District

JUDGMENT

This cause came on to be heard upon the transcript of the record of the chancery court of Sebastian County, Ft. Smith District, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and National Surety Corporation,

surety in the supersedeas bond filed in this cause, the sum of Twelve Hundred Fifty Dollars, with interest at six per cent per annum from the 15th day of November, A.D. 1961, the amount of decree in said chancery court.

It is further ordered and decreed that said appellee recover of said appellant and said surety all its costs in this Court and the court below in this cause expended, and have execution thereof.

HARRIS, C. J., dissents.

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or Territorial Laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; * * *

* * * * * *

6A Arkansas Statutes, Annotated (1947 ed., 1957 Replacement):

68–101. *Requirements for negotiability.*—An instrument to be negotiable must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer;

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

68–102. *Sum certain—Definition.*—The sum payable is a sum certain within the meaning of the Act, although it is to be paid:

(1) With interest; or

(2) By stated instalments; or,

(3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or,

(4) With exchange, whether at a fixed rate or at the current rate; or,

(5) With costs of collection or any attorney's fee, in case payment shall not be made at maturity.

68–910. *Attorney's fee—Provision enforceable.*—A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent [10%] of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity.

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